

June 24, 2002

D.T.E. 02-21

Global NAPs Inc.'s Adoption of the Terms of the Interconnection Agreement Between Global NAPs, Inc. and Verizon Rhode Island Pursuant to the Bell Atlantic/GTE Merger Conditions

APPEARANCES: Keefe B. Clemons, Esq.
Verizon Massachusetts
185 Franklin Street
Boston, MA 02110

FOR: VERIZON NEW ENGLAND, INC. D/B/A
VERIZON MASSACHUSETTS
Petitioner

Cameron F. Kerry, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC
One Financial Center
Boston, MA 02111

-and-

William J. Rooney, Jr.
General Counsel
Global NAPs, Inc.
89 Access Road
Norwood, MA 02062

FOR: GLOBAL NAPS, INC.
Petitioner

I. INTRODUCTION

On March 26, 2002, pursuant to section 252(e) of the Telecommunications Act of 1996 (the “Act”), Verizon New England, Inc. d/b/a Verizon Massachusetts (“Verizon” or “VZ”) filed for review by the Massachusetts Department of Telecommunications and Energy (“Department”) a final negotiated interconnection agreement between Verizon Rhode Island and Global NAPs, Inc. (“Global NAPs”), which was entered into in Rhode Island in October 1998 (“Rhode Island Agreement”). Verizon and Global NAPs seek to adopt the Rhode Island Agreement in Massachusetts pursuant to Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, 15 FCC Rcd 14032, App. D at ¶ 32 (2000) (“BA/GTE Merger Order”). The BA/GTE Merger Order requires Verizon, under certain circumstances, to permit requesting carriers to adopt in one state an interconnection agreement that was voluntarily negotiated in another state.¹

¹ Paragraph 32 of Appendix D of the BA/GTE Merger Order states, in pertinent part:

32. In-Region Pre-Merger Agreements. Subject to the Conditions specified in this Paragraph, Bell Atlantic/GTE shall make available: (1) in the Bell Atlantic Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement) subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions that was voluntarily negotiated by a Bell Atlantic incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date and (2) in the GTE Service Area to any requesting telecommunications carrier any

(continued...)

Pursuant to notice duly issued, the Department held a public hearing in this proceeding on May 16, 2002. The Department received comments from Verizon and Global NAPs at the hearing. In addition, the Department received written initial and reply comments from Verizon and Global NAPs in response to our request for written comments on the Rhode Island Agreement.

II. DESCRIPTION OF AGREEMENT

A. Introduction

What makes this proceeding other than a straightforward adoption in Massachusetts of the Rhode Island Agreement pursuant to the BA/GTE Merger Order is a provision within the Rhode Island Agreement regarding reciprocal compensation for telecommunications traffic bound for Internet service providers ("ISP-bound traffic"), an issue with which the Department

¹(...continued)

interconnection arrangement, UNE, or provisions of an interconnection agreement subject to 47 U.S.C. § 251(c) that was voluntarily negotiated by a GTE incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date, provided that no interconnection arrangement or UNE from an agreement negotiated prior to the Merger Closing Date in the Bell Atlantic Area can be extended into the GTE Service Area and vice versa. . . . Bell Atlantic/GTE shall not be obligated to provide pursuant to this Paragraph any interconnection arrangement or UNE unless it is feasible to provide given the technical, network and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made Disputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable.

has dealt in numerous orders.^{2, 3} Section 5.7.2.3 of the Rhode Island Agreement provides that Verizon will pay Global NAPs reciprocal compensation for ISP-bound traffic until such time as the FCC or a court determines that ISP-bound traffic is not “local traffic” or is otherwise not compensable.⁴ According to a February 2002 ruling by the Rhode Island Public Utilities

² See MCI WorldCom, D.T.E. 97-116 (1998); D.T.E. 97-116-A (1999); D.T.E. 97-116-B (1999); D.T.E. 97-116-C (1999); D.T.E. 97-116-D/99-39 (2000); D.T.E. 97-116-E (2000); and D.T.E. 97-116-F (2001). The Department’s D.T.E. 97-116-C Order held that the Federal Communications Commission (“FCC”), in issuing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Notice of Proposed Rulemaking, FCC 99-38 (rel. February 26, 1999) (“Internet Traffic Order”), had, in effect, nullified an earlier Department ruling permitting reciprocal compensation for ISP-bound traffic. D.T.E. 97-116-C at 21-22, 25. Therefore, the Department concluded that there was no Department order in place requiring reciprocal compensation payments for such traffic. Id. at 25. In the absence of a method to segregate local traffic from ISP-bound traffic, the Department approved a 2:1 ratio of terminating to originating traffic, the excess of which Verizon could presume, subject to rebuttal by the submitting carrier, was terminating to an ISP, and, thus, exclude from reciprocal compensation payments. Id. at 28 n.31. The Department’s D.T.E. 97-116-D/99-39, 97-116-E, and 97-116-F Orders upheld these conclusions. In March 2000, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded the FCC’s Internet Traffic Order for further explanation. Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 2000).

³ WorldCom, Inc. and Global NAPs have appealed the Department’s D.T.E. 97-116-C, D/99-39, E, and F Orders in this docket; the appeals are currently under review in the United States District Court for the District of Massachusetts in Global NAPs, Inc., et al. v. Verizon New England, Inc., et al., Case Nos. 00-CV-10407 RCL; 00-CV-10502 RCL; 00-CV-11513 RCL (D. Mass.).

⁴ Section 5.7.2.3 of the Rhode Island Agreement states:

The Parties stipulate that they disagree as to whether traffic that originates on one Party’s network and is transmitted to an Internet Service Provider (“ISP”) connected to the other Party’s network (“ISP Traffic”) constitutes Local Traffic as defined herein, and the charges to be assessed in connection with such traffic. The issue of

(continued...)

Commission (“RI PUC”), the FCC’s February 1999 Internet Traffic Order did not release Verizon from its obligations under Section 5.7.2.3 to compensate Global NAPs for termination of ISP-bound traffic in Rhode Island, and Verizon was required to continue such payments until June 14, 2001 (see Global NAPs Comments, Exh. F (Complaint of Global NAPs, Inc. Against Bell Atlantic–Rhode Island Regarding Reciprocal Compensation, RI PUC Docket No. 2967, Report and Order, at 7-8 (February 20, 2002)).⁵

⁴(...continued)

whether such traffic constitutes Local Traffic on which reciprocal compensation must [sic] be paid pursuant to the 1996 Act is presently before the FCC in CCB/CPD 97-30 and may be before a court of competent jurisdiction. The Parties agree that the decision of the FCC in that proceeding, or as [sic] such court, shall determine whether such traffic is Local Traffic (as defined herein) and the charges to be assessed in connection with ISP Traffic. If the FCC or such court determines that ISP Traffic is Local Traffic, as defined herein, or otherwise determines that ISP Traffic is subject to reciprocal compensation, it shall be compensated as Local Traffic under this Agreement unless another compensation scheme is required under such FCC or court determination. Until resolution of this issue, BA agrees to pay GNAPS Reciprocal Compensation for ISP Traffic (without conceding that ISP Traffic constitutes Local Traffic or precluding BA’s ability to seek appropriate court review of the issue) pursuant to the [Rhode Island] commission’s Order in Case 97-C-1275, dated March 19, 1998, as such Order may be modified, changed or reversed.

⁵ In its February 2002 Order, the RI PUC determined that June 14, 2001, was the cut-off date for payments of reciprocal compensation for ISP-bound traffic in Rhode Island because that was the effective date of the FCC’s Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier Compensation for ISP-bound Traffic, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. April 27, 2001) (“Order on Remand”). In the Order on Remand, the FCC affirmed its earlier conclusion in the Internet Traffic Order that ISP-bound traffic was not subject to reciprocal compensation, but re-examined the analysis it used to reach that conclusion. The FCC determined that

(continued...)

On November 15, 2000, Global NAPs and Verizon executed a letter agreement stating that Global NAPs could adopt the Rhode Island Agreement in Massachusetts effective July 24, 2000 (see Global NAPs Comments, Exh. H at ¶ 2). However, because the parties disagreed regarding the application of Section 5.7.2.3 of the agreement in other states, neither party sought Department approval of the Rhode Island Agreement until the outcome of an action brought before the FCC by Global NAPs, in which Global NAPs sought a declaration that Verizon must make Section 5.7.2.3 of the Rhode Island Agreement available for adoption in Massachusetts and Virginia pursuant to the BA/GTE Merger Order.

On February 28, 2002, the FCC ruled that Verizon erred in not offering the entire Rhode Island Agreement (including Section 5.7.2.3) to Global NAPs for adoption in Massachusetts and Virginia, but indicated that it was the responsibility of those individual state commissions to determine under 47 U.S.C. § 252(e)(2) whether particular terms of the agreement (including Section 5.7.2.3, if submitted) should be adopted and what meaning those terms would be given. Global NAPs, Inc. v. Verizon Communications, et al., File No. EB-01-

⁵(...continued)

ISP-bound traffic was “information access” traffic, a type of traffic specifically excluded from reciprocal compensation obligations by 47 U.S.C. § 251(g). See Order on Remand at ¶ 30. Rather than completely eliminating compensation for this type of traffic, however, the FCC established a transitional cost recovery mechanism consisting of a series of rate and growth caps. See id. at ¶¶ 77-88. The United States Court of Appeals for the District of Columbia Circuit recently remanded (without vacating) the FCC’s Order on Remand stating that section 251(g) is worded simply as a transitional device, and, thus, the FCC’s reliance on this section as a legal base for adopting rules for ISP-bound traffic was precluded. WorldCom, Inc. v. FCC, No. 01-1218 (D.C. Cir. May 3, 2002). The Court, however, allowed the FCC’s rules regarding compensation for ISP-bound traffic to stay in effect while the FCC addresses the Court’s further remand. Id.

MD-010, Memorandum Opinion and Order, FCC 02-59, at ¶¶ 19-21 (rel. February 28, 2002) (“Global NAPs Order”). On March 26, 2002, Verizon submitted the Rhode Island Agreement to the Department for review.

B. Verizon’s Position

Verizon seeks a ruling from the Department that Section 5.7.2.3 of the Rhode Island Agreement does not require that Verizon pay Global NAPs reciprocal compensation for ISP-bound traffic in Massachusetts after May 19, 1999 (i.e., the date of the Department’s D.T.E. 97-116-C Order) (VZ Comments at 12-15). Verizon argues that the Rhode Island Agreement required parties to pay reciprocal compensation for ISP-bound traffic only until the FCC resolved the issue of the appropriate jurisdictional treatment of such traffic (id. at 14). Verizon argues that since the Department’s D.T.E. 97-116-C Order issued in May 1999, the Department has recognized that the FCC determined ISP-bound traffic was non-local in its Internet Traffic Order (id. at 14). Therefore, Verizon argues that the Department should reach the same conclusion regarding the Rhode Island Agreement, which contains substantially similar operative terms as the MCI WorldCom interconnection agreement the Department reviewed in its D.T.E. 97-116-C Order and the Global NAPs interconnection agreement the Department reviewed in D.T.E. 97-116-D/99-39 Order (id. at 14-15).

Verizon further argues that the RI PUC’s interpretation of Section 5.7.2.3 is not binding or res judicata in Massachusetts (VZ Reply Comments at 2-3). Verizon argues that the FCC made clear in the Global NAPs Order that the Rhode Island Agreement would be subject to a de novo review by the Department, which has the right to interpret any provision of the Rhode

Island Agreement as it is to be applied in Massachusetts (id. at 3). To bind one state to a commission decision of another state, Verizon argues, could result in conflicts with clear public policy or previous decisions issued by the second state, and would render the state commission review process under section 252(e) meaningless (id.).

Verizon also argues that, if the Department were to determine that Section 5.7.2.3 would otherwise entitle Global NAPs to receive reciprocal compensation for ISP-bound traffic after May 19, 1999, the Department should deny the approval of the Rhode Island Agreement if it includes Section 5.7.2.3, because such compensation would be unreasonable, uneconomic, and contrary to public policy and the public interest (VZ Comments at 15-16; VZ Reply Comments at 1-2). Verizon argues that while the Department has not indicated that compensation for ISP-bound traffic is per se against public policy, the Department has clearly said that unqualified payment of reciprocal compensation for ISP-bound traffic is contrary to public policy and is inconsistent with economic efficiency (VZ Comments at 16). Verizon argues that the Rhode Island Agreement is materially different from the Department-approved Level 3 and PaeTec interconnection agreements which created a class of traffic identified as “compensable Internet traffic” (VZ Reply Comments at 4-5). Verizon argues that, unlike the Rhode Island Agreement, the Level 3 and PaeTec agreements were negotiated and entered into pursuant to the Department’s directives in D.T.E. 97-116-C to negotiate compensation consistent with the FCC’s finding that ISP-bound traffic is not local traffic and is not eligible for reciprocal compensation (id. at 5). Finally, Verizon argues that allowing Global NAPs to recover reciprocal compensation under Section 5.7.2.3 of the Rhode Island Agreement would

be inconsistent with the Department's decision in D.T.E. 97-116-C and would be precisely the type of unqualified and uneconomic payments that the Department has rejected as a matter of public policy (VZ Comments at 16).

C. Global NAPs' Position

Global NAPs argues that the Department should approve the parties' adoption of the Rhode Island Agreement in Massachusetts because the agreement meets the standard for approval under section 252(e)(2) (Global NAPs Comments at 9-11). Global NAPs argues that seven other state commissions have determined that agreements containing provisions identical to Section 5.7.2.3 are consistent with the public interest, convenience, and necessity; and that no state has rejected the provision (id. at 10). Global NAPs likens Section 5.7.2.3 of the Rhode Island Agreement to the Department-approved amendments to the Level 3 and PaeTec interconnection agreements which established Internet traffic as a separate class of traffic and established a compensation mechanism for such traffic; and argues that, as such, the Department should likewise approve Section 5.7.2.3 of the Rhode Island Agreement (id.). The "narrow window of time" for which Global NAPs argues that reciprocal compensation is due for Global NAPs' termination of ISP-bound traffic in Massachusetts under Section 5.7.2.3 of the Rhode Island Agreement is an eleven month period from July 24, 2000 (the agreed-upon adoption date of the Rhode Island Agreement in Massachusetts) to June 14, 2001 (the effective

date of the FCC's Order on Remand establishing an interim intercarrier compensation mechanism) (Global NAPs Reply Comments at 2).⁶

Global NAPs further argues that Verizon's opposition to the Department's approval of the entire Rhode Island Agreement (including Section 5.7.2.3) is in violation of the parties' November 2000 agreement, the BA/GTE Merger Order, and Verizon's obligations to negotiate in good faith under 47 U.S.C. § 252 (Global NAPs Comments at 11-12). Global NAPs argues that the negotiated arrangement in Section 5.7.2.3 to pay reciprocal compensation for ISP-bound traffic pending an FCC determination is consistent with the Department's stated preference for upholding negotiated agreements driven by market forces, and, therefore, should be enforced by the Department (id. at 13-16). Global NAPs further argues that, in its D.T.E. 97-116-F Order, the Department expressed a willingness to apply "a different basis" for reciprocal compensation for ISP-bound traffic, and argues that the Rhode Island Agreement provides that basis (id. at 17). Global NAPs argues that, like the Level 3 and PaeTec agreements, the Rhode Island Agreement is an instance where negotiation has borne commercial fruit, providing an interim resolution to the issue of reciprocal compensation for ISP-bound traffic, which Verizon agreed to, abided by in Rhode Island, and is obligated to make available in other states pursuant to the BA/GTE Merger Order (id. at 17-18).

⁶ The entire term of the Rhode Island Agreement if approved in Massachusetts would be July 24, 2000 (the agreed-upon adoption date of the Rhode Island Agreement in Massachusetts) to October 1, 2001 (the expiration date of the Rhode Island Agreement) (Tr. at 9-10). The Rhode Island Agreement became effective in Rhode Island in October 1998.

Global NAPs further argues that Verizon is precluded by the doctrine of collateral estoppel from re-litigating in this forum the February 2002 RI PUC decision requiring Verizon Rhode Island to pay reciprocal compensation for termination of ISP-bound traffic though June 14, 2001 (Global NAPs Rely Comments at 5-6). Global NAPs also argues that the notion of comity embodied in the Full Faith and Credit Clause of the United States Constitution requires that proper respect be paid to the RI PUC decision, even if the Department itself might reach a different result (id. at 6-7). Global NAPs argues that the BA/GTE Merger Order encourages a policy of certainty and uniformity throughout the BA/GTE region, which would be thwarted if Verizon could collaterally challenge a contract construction already fully litigated in the state of the contract's initial filing (id. at 7).

Global NAPs also argues that, if the Department does re-open the interpretation of Section 5.7.2.3 in its review, "resolution of the issue" of reciprocal compensation for ISP-bound traffic pursuant to Section 5.7.2.3 has never been achieved (id. at 8-9). The FCC's first attempt at resolution in the Internet Traffic Order was vacated and remanded by the D.C. Circuit Court, and the FCC's second attempt at resolution in the Order on Remand was likewise remanded to the FCC (id.). Global NAPs argues that these actions currently leave the issue in an undeterminable status (id.).

Finally, Global NAPs argues that the Department need not interpret Section 5.7.2.3 at all as part of the instant proceeding (Global NAPs Comments at 19). Global NAPs states that the Rhode Island Agreement contains procedures for dispute resolution, and if the agreement is approved by the Department, Verizon then has the option to dispute Global NAPs' bill for

payment for termination of ISP-bound traffic; therefore, the Department should require Verizon to follow the contractual dispute procedures before seeking declaratory relief from the Department (id. at 19-20).

III. STANDARD OF REVIEW FOR NEGOTIATED AGREEMENTS

Section 252(e)(1) of the Act requires parties to an interconnection agreement to submit the agreement to a state commission for approval, and further requires state commissions to approve or reject the agreement with written findings as to any deficiencies. The state commission may only reject negotiated portions of an agreement if it finds that: (1) the agreement discriminates against a telecommunications carrier not a party to the agreement, or (2) the implementation of such agreement is not consistent with the public interest, convenience, and necessity. 47 U.S.C. § 252(e)(2)(A). Section 252(e)(3) of the Act preserves state commission authority to establish or enforce other requirements of state law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. 47 U.S.C. § 252(e)(3).

IV. ANALYSIS AND FINDINGS

The parties have asked us to review a negotiated interconnection agreement between Verizon Rhode Island and Global NAPs for adoption in Massachusetts. If approved, the interconnection agreement will have an effective term of July 24, 2000 to October 1, 2001. As an initial matter, we decline to accept Global NAPs' suggestion to approve the Rhode Island Agreement for adoption in Massachusetts without addressing the issues raised by Section 5.7.2.3 of the agreement. It is clear from the positions of the parties in this matter that both the

meaning of the language in Section 5.7.2.3 and whether this language is consistent with the requirements of 47 U.S.C. § 252(e) are in dispute. We agree with the FCC that our responsibilities under section 252(e)(2) require us to resolve this dispute and not defer the dispute until addressed through contractual dispute resolution procedures.⁷ Therefore, we will examine Section 5.7.2.3, which, as stated above in n.4, requires Verizon to pay reciprocal compensation for the termination of ISP-bound traffic “until resolution of the issue” by the FCC or a court of competent jurisdiction.

Global NAPs argues that both collateral estoppel and the notion of comity embodied in the Full Faith and Credit Clause require the Department to adopt the RI PUC’s interpretation of Section 5.7.2.3. We do not agree that we are bound by the RI PUC’s interpretation. Paragraph 32 of Appendix D of the BA/GTE Merger Order, pursuant to which Global NAPs seeks to adopt the Rhode Island Agreement in Massachusetts, states that “[Verizon] shall not be obligated to provide pursuant to this Paragraph any interconnection arrangement . . . unless it is . . . consistent with the laws and regulatory requirements of [] the state for which the request is made” In addition, 47 U.S.C. § 252(e)(3) states, “[S]ubject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement” While the RI PUC’s interpretation of Verizon’s obligations under Section 5.7.2.3 may be useful, it is not dispositive here. We do not read the BA/GTE Merger Order as requiring our binding adoption of another PUC’s view

⁷ “[O]nly the relevant state commission may ultimately decide whether particular terms of the agreement should be adopted in that state, and if so, what those terms mean.” Global NAPs Order at ¶ 19.

of its own state's law concerning a negotiated agreement. That reservation is particularly strong where, as here, the adopting state has fully litigated the contested issue.⁸ Therefore, we must conduct a review of Section 5.7.2.3 of the Rhode Island Agreement by looking at the situation in Massachusetts, not Rhode Island; and our review is controlled by the prior decisions rendered by the Department (and, ultimately, the courts that review these decisions), not, with all respect to a sister agency, the RI PUC.

The Department has a well-established position on the issue of reciprocal compensation for ISP-bound traffic (see n.2, above, for a brief overview). Both Global NAPs and Verizon have vigorously participated in the numerous Department proceedings that have addressed this issue.⁹ What we must do is evaluate the Rhode Island Agreement in the context of the

⁸ In our D.T.E. 97-116-C Order at 25 n.27, we acknowledged that other state commissions have addressed the issue of reciprocal compensation for ISP-bound traffic in different ways:

The parties to this docket have diligently provided the Department with other states' decisions on reciprocal compensation rendered since Internet Traffic Order was issued. We have reviewed those filings. Other state commissions have considered the effects of the FCC's ruling on *their* situations, on the interconnection agreements before them, and on prior decisions rendered. . . . Useful as it has been to know what other states have made of the FCC's ruling, it is equally useful to recall Commissioner [now FCC Chairman] Powell's observation about the effects of that ruling: "Furthermore, having reviewed a number of state decisions in this area, I am persuaded that the underlying facts, analytical underpinnings and applicable law vary enormously from state to state." Internet Traffic Order, Concurrence of Commissioner Powell, page 2 [emphasis in original].

⁹ For example, in D.T.E. 97-116-D/99-39, the Department reviewed an April 1999 Motion for Complaint filed by Global NAPs against Verizon (then Bell Atlantic),
(continued...)

Department's prior decisions interpreting FCC orders regarding reciprocal compensation for ISP-bound traffic. As we have done in our D.T.E. 97-116 series of orders, we begin with the language of the interconnection agreement at issue.

Under Section 5.7.2.3 of the Rhode Island Agreement, the parties could not agree whether ISP-bound traffic constituted "local traffic" as defined in the agreement.¹⁰ Therefore, the parties agreed that the decision of the FCC in its CCB/CPD 97-30 proceeding (i.e., the proceeding that resulted in the FCC's Internet Traffic Order (see Tr. at 13)), or the decision of a court of competent jurisdiction, would provide "resolution of the issue" whether ISP-bound

⁹(...continued)

seeking a declaratory ruling from the Department that, under the terms of the parties' earlier interconnection agreement, Verizon must pay Global NAPs reciprocal compensation for the termination of ISP-bound traffic. The Department concluded that the operative provisions of that Global NAPs agreement (i.e., the definition of local traffic and the payment of reciprocal compensation) were in all material respects the same as the provisions in the MCI WorldCom agreement which were the subject of the Department's D.T.E. 97-116-C Order. See D.T.E. 97-116-D/99-39, at 20-21. Therefore, in affirming its decision in D.T.E. 97-116-C, the Department dismissed Global NAPs' complaint as moot. Id. at 21. In the instant case, Global NAPs raises the same claim, but is using the Rhode Island Agreement as the base for its claim.

¹⁰ "Local traffic" is defined in the Rhode Island Agreement at Section 1.50 as "traffic that is originated by a Customer of one Party on that Party's network and terminated to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ('EAS') area, as defined in BA's effective Customer tariffs, or, if the [RI PUC] has defined local calling areas applicable to all LECs, then as so defined by the [RI PUC]." This definition of local traffic is similar, although not identical, to the definition of local traffic contained in the MCI WorldCom agreement at Section 1.38 examined in D.T.E. 97-116-C ("Local Traffic" means a call which is originated and terminated within a given LATA, in the Commonwealth of Massachusetts, as defined in DPU Tariff 10, Section 5, except for those calls that are specified to be terminated through switched access arrangements") and the Global NAPs agreement at Section 1.38 examined in D.T.E. 97-116-D/99-39 ("Local Traffic" means a call which is originated and terminated within a given LATA, in the Commonwealth of Massachusetts, as defined in DPU Tariff 10, Section 6").

traffic was to be compensated as local traffic under the agreement. Until the issue should be thus resolved, the parties agreed that Verizon would pay reciprocal compensation for ISP-bound traffic. See Rhode Island Agreement at Section 5.7.2.3.

For the reasons discussed below, when Section 5.7.2.3 is read in conjunction with the Department's orders, we must deny the recovery of reciprocal compensation for ISP-bound traffic in Massachusetts from July 24, 2000, through June 14, 2001. Our precedent states that the issue of whether ISP-bound traffic is local traffic and, thus, subject to payment of reciprocal compensation, was resolved in Massachusetts with the issuance of the FCC's Internet Traffic Order in February 1999. As we stated in D.T.E. 97-116-C, the FCC's Internet Traffic Order held that ISP-bound traffic was not local traffic, but rather interstate traffic, and, thus, the FCC struck down the sole and express basis for the Department's earlier holding that interconnection agreements required reciprocal compensation for terminating ISP-bound traffic. See D.T.E. 97-116-C at 21-22. Accordingly, we concluded that without a current effective Department Order requiring Verizon to pay interconnecting carriers for termination of ISP-bound traffic, no compensation payments for this "non-local" traffic were required.¹¹ See id.

Section 5.7.2.3's meaning is clear: the FCC's determination expressed in CCB/CPD 97-30 (i.e., the Internet Traffic Order) would decide whether ISP-bound traffic would be

¹¹ We further stated that we expected carriers to begin the voluntary negotiation process to establish an inter-carrier compensation mechanism for ISP-bound traffic not disbursed as of February 26, 1999 (the date of the Internet Traffic Order) and all later-occurring ISP-bound traffic. D.T.E. 97-116-C at 30. Pursuant to our directive, in 1999, PaeTec Communications, Inc. ("PaeTec") and Level 3 Communications, Inc. ("Level 3") negotiated with Verizon interconnection agreement amendments establishing a new class of traffic called "compensable Internet traffic."

compensated as local traffic under the Rhode Island Agreement. By seeking to implement an interconnection agreement in Massachusetts, Verizon and Global NAPs are bound by our interpretation and application of the Internet Traffic Order in Massachusetts.¹²

Moreover, we do not agree that the issue of reciprocal compensation for ISP-bound traffic is in an “undeterminable” or unresolved status in Massachusetts. When the D.C. Circuit Court vacated and remanded the Internet Traffic Order, we indicated that we would maintain the status quo established by our D.T.E. 97-116-C Order until the FCC acted on remand. See D.T.E. 97-116-E at 15. When the FCC released its Order on Remand, we issued our D.T.E. 97-116-F Order, finding that the Order on Remand did not invalidate our prior orders, and implementing in Massachusetts the requirements set forth in the Order on Remand. At no time in Massachusetts could the position of the Department on the issue of reciprocal compensation for ISP-bound traffic be characterized as undeterminable. Now that the D.C. Circuit Court has remanded (without vacating) the FCC’s Order on Remand, we determine that, just as the Court has permitted the FCC rules to stay in full force and effect during the pendency of the remand,

¹² While our interpretation of the effect of the FCC’s Internet Traffic Order on carrier obligations with regard to payments for the termination of ISP-bound traffic in Massachusetts in D.T.E. 97-116-C differed from the RI PUC’s interpretation of carrier obligations in Rhode Island, both the Department and the RI PUC acted according to the facts, circumstances, and prior decisions before them, and each commission binds the carriers subject to its jurisdiction. In addition, each state in which Global NAPs seeks to adopt the Rhode Island Agreement must conduct its own evaluation of the agreement’s compliance with section 252, which includes compliance with that state’s requirements. See Global NAPs Comments at Exh. I (Joint Petition of Verizon Pennsylvania and Global NAPs, Inc. for Approval of an Interconnection Agreement by Means of Adoption, PA PUC A-31-771, Opinion and Order (June 6, 2001)).

the Department's order implementing those rules likewise stays in full force and effect. See WorldCom, Inc. v. FCC, Case No. 01-1218 (D.C. Cir. May 3, 2002).

In addition, we do not find that the Rhode Island Agreement is analogous to the Department-approved PaeTec and Level 3 interconnection agreements which established a separate class for ISP-bound traffic and a compensation mechanism for such traffic. While we have a preference for carrier negotiation over regulatory determinations, and we do not disagree that the Rhode Island Agreement was the product of a 1998 negotiation between Verizon Rhode Island and Global NAPs, the language of Section 5.7.2.3 of the agreement requires Verizon to compensate Global NAPs for the termination of ISP-bound traffic only until the issue of whether such traffic is "local traffic" is resolved. As discussed above, that issue was resolved in Massachusetts with the issuance of the FCC's Internet Traffic Order in February 1999.

In sum, we determine that the language of Section 5.7.2.3 of the Rhode Island Agreement, when viewed in the light of our precedent, must be interpreted to deny the recovery of reciprocal compensation payments for ISP-bound traffic post-Internet Traffic Order. As we stated in D.T.E. 97-116-C at 28 n.31, ISP-bound traffic is defined in Massachusetts as traffic in excess of a 2:1 terminating to originating ratio. With this interpretation in mind, consistent with our review of prior negotiated interconnection agreements, we find that the Rhode Island Agreement, as Section 5.7.2.3 of that agreement is interpreted herein, does not discriminate against a telecommunications carrier not a party to the agreement; that implementation of the agreement is consistent with the public interest,

convenience, and necessity; and that the agreement does not conflict with State requirements.

Accordingly, subject to the interpretation of Section 5.7.2.3 as discussed herein, the

Department approves the Rhode Island Agreement for adoption in Massachusetts for the term July 24, 2000 to October 1, 2001.

V. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the final negotiated interconnection agreement between Verizon New England, Inc. d/b/a Verizon Massachusetts and Global NAPs, Inc., filed with the Department on March 26, 2002, and subject to the interpretation set out in this Order, be and is hereby approved for the term July 24, 2000 to October 1, 2001; and it is

FURTHER ORDERED: That Verizon and Global NAPs comply with all other directives contained herein.

By Order of the Department,

_____/s/_____
Paul B. Vasington, Chairman

_____/s/_____
James Connelly, Commissioner

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner

DISSENTING OPINION OF EUGENE J. SULLIVAN, COMMISSIONER

The Department has had a wide ranging discussion of reciprocal compensation in the D.T.E. 97-116 series of decisions. In D.T.E. 97-116-C (1999), I signed a concurrence in part and dissent. The concerns expressed in the dissent in D.T.E. 97-116-C remain applicable today. Verizon would like to have the best of all worlds by picking and choosing individual elements of a negotiated agreement and applying those elements in a piecemeal fashion on a state by state basis. I respectfully dissent from the majority opinion allowing Verizon to do this.

A negotiated agreement between Verizon and Global NAPs has been placed squarely before us in this case. The Department has clearly and consistently said that we prefer voluntarily negotiated agreements over the imposition of regulations. We have said that the marketplace is the best place to determine the disposition of company to company issues. In D.T.E. 97-116-D at 19, the Department referred to the FCC's Internet Traffic Order and stated that, "[g]iven the variety of possible commercial arrangements between LEC and ISP, the FCC tentatively concluded that a negotiation process, driven by market forces, was more likely to lead to efficient outcomes than are rates set by regulation." Citing D.T.E. 97-116-C at 27-31, we noted that the Department "concurred with this conclusion and suggested that the parties in this matter pursue that course of action rather than renewing their quarrel over the payment of reciprocal compensation." Id. The Department offered further guidance in D.T.E. 97-116-D, stating that we would "prefer to see negotiated amendments to all of the interconnection issues here. As a general rule, it is better – far better – for businesses, rather than regulators, to

reach commercial decisions.” Id. In the face of such clear statements, it is difficult to understand how the majority opinion reaches a different conclusion today.

I stand by the concerns I raised in D.T.E. 97-116-C with my partial concurrence and dissent. I also am guided by the FCC’s decision that negotiated agreements in one state can apply in another state. Since the Rhode Island Agreement has been negotiated, and since we have consistently stated that such a negotiated settlement is our preference, I reach the conclusion that the entire Rhode Island Agreement should apply in Massachusetts.

_____/s/_____
Eugene J. Sullivan, Jr., Commissioner

Appeal of this Order shall be taken in accordance with applicable law. Timing of the filing of such an appeal is governed by the applicable rules of the appellate body to which the appeal is made.